

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of)

)
Guidelines for Evaluating the Environmental
Effects of Radiofrequency Radiation)

ET Docket No. 93-62

Mr. William Caton, Esq.
Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M. Street N.W. Room 222
Washington, DC 20554

Dear Mr. Caton,

Re: Motion to Dismiss a petition for reconsideration, original + 14 copies

Enclosed please find an original and 14 copies of a MOTION TO DISMISS PETITION FOR PARTIAL RECONSIDERATION AND/OR CLARIFICATION OF AMERITECH MOBILE COMMUNICATIONS, INC.

Please assure these are appropriately distributed and put in the official record of this proceeding.

Thank you,



David Fichtenberg as an individual and as President,
Ad-hoc Association of Parties Concerned About The Federal
Communications Commission's Radiofrequency Health and Safety Rules
PO Box 7577
Olympia, WA 98507-7577 Tel: (206) 722-8306

Dated: November 26, 1997

Mr. William Caton
11/27/97

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FEDERAL COMMUNICATIONS COMMISSION

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**MOTION TO DISMISS PETITION FOR PARTIAL RECONSIDERATION AND/OR
CLARIFICATION
OF AMERITECH MOBILE COMMUNICATIONS, INC.**

Submitted by

David Fichtenberg

and by

Ad-Hoc Association of Parties Concerned About

The Federal Communications Commission

Radiofrequency Health and Safety Rules

Tel: (206) 722-8306

Dated November 26, 1997

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**MOTION TO DISMISS PETITION FOR PARTIAL RECONSIDERATION AND/OR
CLARIFICATION OF AMERITECH MOBILE COMMUNICATIONS, INC.**

David Fichtenberg and the Ad-Hoc Association of Parties Concerned About the Federal Communications Commission Radiofrequency Health and Safety Rules ("Ad-Hoc Association") hereby make a motion to the Commission to dismiss the Petition for Partial Reconsideration and/or Clarification of Ameritech Mobile Communications, Inc. ("Ameritech") responding to the Commission's Second Memorandum Opinion and Order ("2nd "MO&O") in the notice FCC 97-303 released August 25, 1997, and which petition Ameritech submitted on October 14, 1997 in ET-Docket 93-62, with public notice in the Federal Register on November 12, 1997 [Federal Register, Volume 62, No. 218, page 60712]. This Ameritech petition is hereafter called the "Ameritech 1997 Petition". This motion is made because the Ameritech 1997 Petition is not a valid petition for reconsideration in accordance with 47 CFR Section 1.429 because it makes requests which (i) were already addressed by the Commission, (ii) do not pertain to any new rules adopted in the 2nd MO&O, or (iii) pertain to issues in another docket, and so are irrelevant in this proceeding. Thus, in accordance with 47 CFR 1.429(i), the Ameritech 1997 Petition is not subject to reconsideration and should be dismissed. Moreover, continuance of this frivolous petition may delay consideration of a petition for review of this 2nd MO&O and related rulings before the Court of Appeals and in which the movants are petitioners.

David Fichtenberg and the Ad-Hoc Association notes the Commission requires that,

"Any order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order. Except in such circumstances, a second petition for reconsideration may be dismissed by the staff as repetitious." (emphasis added).

However, in every case, the Ameritech 1997 Petition either asks the Commission to make modifications to its rules which it has already considered and declined to make, it makes requests pertaining to a notice of proposed rulemaking in WT Docket 97-192 and therefore are irrelevant to ET-Docket 93-62, and in no instance, does Ameritech address any modifications in the 2nd MO&O which were modifications to any previous order or a new rule.

Consider the following:

1. Ameritech's first request is *"The Commission should revise or clarify its policy concerning State and local information requests, to allow categorically excluded licensees to interim certify compliance, or to merely recite the factors creating exclusions."* [Ameritech 1997 Petition at 2]. However, the policy referred to which Ameritech wants changed is given in FCC 97-303 in paragraph #146. This paragraph is part of a new Notice of Proposed Rulemaking WT 97-142, ("NPRM") and is not part of the 2nd MO&O. Ameritech is quite definite that it is clear what the exclusions in the 2nd MO&O mean and accepts these exclusions. Indeed, the Ameritech 1997 Petition notes that the Commission's NPRM is inconsistent with the final rules in the 2nd MO&O. Then Ameritech argues that the proposed rules must be changed to remove this inconsistency, and offers further comments on alternatives proposed in the NPRM. Since these concerns pertain to the new docket WT 97-192, its presence in a petition for reconsideration of the 2nd MO&O is irrelevant in ET Docket 93-62. [Ameritech 1997 Petition at page 2-3]

2. The Ameritech 1997 Petition second request is that *"The Commission should prescribe a detailed cost-sharing formula for bringing a site into compliance, which licensees could vary by mutual consent."* [Ameritech 1997 petition at 3-4].

However, in Ameritech's September 6, 1996 Petition for Reconsideration ("Ameritech 1996 Petition") it states,

"It is not clear from the Report and Order whether all licensees on a site must share equally in the cost of ensuring compliance or if instead this burden falls on the 'newcommer' licensee. Because the compliance requirement is imposed on renewal applicants, the first party at an antenna site who must file their renewal application may be unfairly subjected to the full burden of compliance by the coincidence of their license expiration date. The Commission should establish clear cut procedures to resolve such issues, with input from the industry."

[Ameritech 1996 Petition at 12-13]

Furthermore, the Commission addressed this issue in the 2nd MO&O by denying the above Ameritech request. The Commission stated,

"In response to the questions posed by Ameritech, PCIA, and US West regarding how the responsibility for compliance is to be shared at multiple transmitter sites, we do not intend to specify detailed instructions on how to allocate responsibility." [2nd MO&O at para. 75] The Commission then goes on to suggest alternatives.

Moreover, the Ameritech 1997 Petition acknowledges it has already raised this issue, stating,

"In response to Ameritech's inquiry about a licensee's failure to cooperate with compliance efforts, the Commission does not establish a specific penalty, but encourages the other licensees at the site to notify 'the appropriate Commission licensing bureau, which will encourage the offender to cooperate.'" (emphasis added). Therefore Ameritech is agreeing it has already raised an *"inquiry"* about this matter, and *"In response"* the Commission has not chosen the mandatory approach sought by Ameritech. Hence, Ameritech's asking again that *"The Commission should prescribe a detailed cost-sharing formula for bringing a site into compliance,"* is repetitious of concerns raised in the Ameritech 1996 Petition.

3. The Ameritech 1997 Petition requests,

"The Commission should clarify whether new applicants can be held responsible for the entire cost of brining a site into compliance, in light of seemingly conflicting statements on this issue." [Ameritech 1997 Petition at 4].

As shown above, in the Ameritech 1996 Petition the Commission was asked to "establish clearcut procedures" to resolve compliance responsibility issues at multiple sites.[Ameritech 1996 Petition at 13]. The Commission responded by leaving its rule unchanged, and stated, *"we do not intend to specify detailed instructions,"* (emphasis added) but rather it chose to make decisions on a case by case basis and asked applicants *"to notify our licensing bureaus"* if there are placed upon them *"unreasonable financial burdens"* [2nd MO&O at para. 75].

Moreover, the Commission has stated it will not issue detailed instructions, but rather deal with complaints on a case by case basis. Yet, Ameritech insists the Commission should make further detailed procedures, e.g. "should clarify that site owners will generally retain the right to refuse access to the site...". [Ameritech 1997 Petition at 5]. This is repititious of its request in its 1996 petition [Ameritech 1996 at 13].

4. Ameritech's 1997 Petition asks,

"The Commission should adopt a reasonable transition period for existing licensees that are otherwise required to achieve immediate compliance because of an Application or facility construction by another facility." [Ameritech Oct. 14, 1997 at 5]

However, the rules adopted in the Commission's Report and Order (FCC 96-326, released August 1, 1996) ("R&O") state,

"In general, when the guidelines specified in section 1.1310 are exceeded in an accessible area due to the emissions from multiple fixed transmitters, actions necessary to bring the area into compliance with the guidelines are the shared responsibility of all licensees..."(whose power levels exceed a 'trigger' value) [47 CFR section 1.1307 (b)(3) in FCC 96-326] Also, these rules stated that after the transition period that new or renewal applicants would have to meet the new exposure criteria [see 47 CFR 1.1307(b)(3)(i) and (3)(ii) in FCC 96-326]. Thus, in the August 1, 1996 R&O it was clear that assuring the new exposure was met was the *"shared responsibility of all licensees."* If Ameritech believed that a transition period was needed for the existing facilities in the area to come into compliance, then it should have raised this concern in the Ameritech 1996 Petition, and not a year later, for the Commission's rules in

this regard are the same in the 2nd MO&O as in the R&O. [2nd MO&O at para. 113].

Therefore, Ameritech's requests relating to this matter are not timely.

5. Ameritech requests that, *"The Commission should place certain limited responsibilities for compliance on site owners."* [Ameritech 1997 Petition at 7], and specifically requests site owners *"make available to current and prospective site users information about other facilities on the tower or building,"* and that *"future tenants perform an RF compliance evaluation"* which is sent to existing users.[Ameritech 1997 Petition at 7].

But Ameritech already raised these concerns in its 1996 Petition. There it stated, "Moreover, it is difficult if not impossible for an individual licensee to be aware of changes that may cause an antenna site to fall out of compliance with the RF radiation standard..." [Ameritech 1996 Petition at 12]. If Ameritech has specific suggestions for the Commission of how to solve this problem, then it should have stated them in its 1996 Petition, and not wait a year. Accordingly, this Ameritech 1997 petition request is not timely. Moreover, after considering the concerns raised by Ameritech in its 1996 petition, the Commission indicated, by omission, that it would not require what Ameritech now requests. Thus, Ameritech's request is both untimely and its general concern was already considered in the 2nd MO&O [FCC 97-3-3 at 73,74].

6. Ameritech requests, *"The Commission should provide additional guidance and uniformity concerning the use of warning signs."* [Ameritech 1997 Petition at 8], and also explains,

"While the Commission has indicated that such signs must provide adequate information to warn persons in the vicinity of any hazard, it has not prescribed specific wording for such signs. It is respectfully submitted that further guidance on this issue is needed." [Ameritech 1997 Petition at 8]

There are a number of difficulties with this request. First, the use of signs to avoid radiofrequency hazards was noted in the R&O in August 1996, stating

"For purposes of these definitions, awareness of the potential for RF exposure can be provided through training as part of an RF safety program. Warning signs and labels can also

be used to establish such awareness as long as they provide information, in a prominent manner, on risk of potential exposure and instructions on methods to minimize such exposure risk."

[R&O, para. 45].

Yet, the Ameritech 1996 Petition was silent about the concern Ameritech now raises, and the 2nd MO&O does not mention signs. Therefore the Ameritech request is untimely.

It is of interest that Ameritech states that the Commission *"has not prescribed specific wording for such signs."* Consider that the Commission's Office of Engineering and Technology OET Bulletin 65 Edition 97-01, with public notice of its release appearing in the 2nd MO&O and occurring on September 12, 1997 in the Federal Register beginning at 62 FR47960 with specific reference at 62 FR47962, has a section on Controlling Exposure to RF Fields (Section 4). In this section in footnote 32, it is noted that *"When signs are used, meaningful information should be placed on the sign advising of the potential for high RF fields."* Since there is no explicit instruction here of what *"meaningful information"* to put, one might argue that Ameritech has a legitimate concern of the adequacy of this edition of OET Bulletin 65.

Indeed, also the Ad-Hoc Association has a number of concerns about OET Bulletin 65 being inadequate and believes that it was unlawfully issued without the required rulemaking that is appropriate for this document that rules on what are sufficient conditions for meeting compliance criteria. However, the Commission has noted in the 2nd MO&O,

"Some of the petitioners and commenters express opinions and offer suggestions about our procedures for developing this document and for allowing review of the revised draft. Ameritech maintains that we should ensure that 'all affected parties' [Ameritech 1997 Petition at 7] are given an opportunity to participate in the formulation of the bulletin" [quote from 2nd MO&O, para #101]. Nevertheless, the Commission ruled "Any additional review would needlessly delay the release of this important document. Therefore, we will not grant requests made by PCIA and others for a more extensive period of public comment." [2nd MO&O, para 103]. The Commission then invites comments regarding areas that need to be addressed and notes that "Bulletin 65 may be revised periodically based upon feedback and questions from industry and the public." [2nd MO&O, para 103].

Accordingly, Ameritech's concern about signs is just one of the class of concerns about inadequacies of OET Bulletin 65 Edition 97-01. The Commission has ruled Bulletin 65 is not subject to a rulemaking proceeding, but rather may be revised based upon feedback, such as that about inadequate specifications about signs. Hence, the Commission has ruled after consideration of the comments of many parties that correcting its Bulletin 65 by way of a rulemaking with its associated petitions for reconsideration was not the manner it would address inadequacies in Bulletin 65. Thus, to this extent, the Ameritech request within a petition for reconsideration is repetitious since the Commission has already received Ameritech's and other requests for a formal comment period regarding this Bulletin and denied such requests.

If Ameritech disagrees with this Commission decision which responded to Ameritech's concerns, then Ameritech may wish to challenge it by way of the process of judicial review.

Thus, the proper response of Ameritech to remedy its concerns is either by way of comments to the Office of Engineering and Technology or by way of seeking judicial review of the Commission's decision not to allow a public comment period. Hence, concerning this matter, Ameritech's request by way of a petition for reconsideration is misplaced.

Discussion:

Ameritech is raising issues most of which it has already raised in its previous Petition for Reconsideration and Clarification of September 6, 1996, and which were denied by the Commission. Other issues it raises are either concerning matters in another docket, are matters which pertain to the Rule and Order of August 25, 1996, and should have been raised earlier, or are matters that pertain to corrections of OET Bulletin 65, which in any case should be addressed in ways other than in a Petition for Reconsideration, as this approach was already ruled against by the Commission.

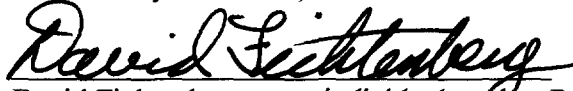
Indeed, since the Commission has denied Ameritech requests, Ameritech may consider a timely withdrawal of its frivolous petition, and instead seek relief as an intervenor in petitions for review of the 2nd MO&O and related rulings in this docket now before the Court of Appeals, e.g. Docket No. 97-1683 in the Court of Appeals for District of Columbia Circuit.

Moreover, David Fichtenberg and the Ad-Hoc Association are parties to the aforementioned appeal, and by persisting in its frivolous petition for reconsideration and clarification Ameritech may have the effect of delaying timely consideration of the above appeal, and thus David Fichtenberg and the Ad-Hoc Association are aggrieved by the continuance of this frivolous petition for reconsideration and clarification.

Conclusions:

The Ameritech 1997 Petition only makes repetitious or irrelevant requests, none of which pertain to rule modifications made in the 2nd MO&O. Accordingly, in accordance with 47 CFR 1.429(i) this petition does not meet the criteria for being a petition which is subject to reconsideration, and should be dismissed by the Commission.

Respectfully submitted,



David Fichtenberg as an individual, and as President of the
Ad-Hoc Association of Parties Concerned About The Federal
Communications Commission Radiofrequency Health and Safety Rules
Tel: (206) 722-8306

Dated: November 26, 1997

Verification: I declare under the penalty of perjury that the foregoing is true and correct.
Executed on November 26, 1997


David Fichtenberg

Certificate of Service

I, David Fichtenberg, hereby certify that I have on this 26th day of November, 1997, sent by first class mail, postage pre-paid, a copy of the foregoing Motion to the following parties

Dennis L. Myers, Vice President and
General Counsel
Ameritech Mobile Communications, Inc.
2000 West Ameritech Center Drive
Location 3H78
Hoffman Estates, Illinois 60195 Tel: (847) 765-5715

John A. Prendergast
Blooston, Mordkofsky, Jackson & Dickens
2120 L Street, Suite 300
Washington, D.C. 20037 Tel: (202) 659-0830

Chairman William E. Kennard
Federal Communications Commission
1919 M Street N.W. Room 814
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street N.W. Room 832
Washington, D.C. 20554

Mr. Robert Cleveland
Office of Engineering and Technology
Federal Communications Commission
2000 M. Street N.W. Room 266
Washington, D.C. 20554

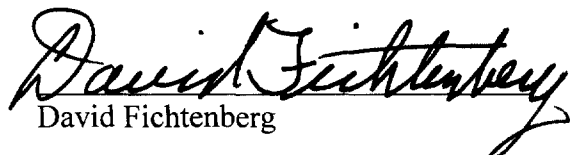
Commissioner Harold Furchtgott-Roth
Federal Communications Commission
1919 M Street N.W. Room 802
Washington, D.C. 20554

Daniel Phythyon, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M. Street N.W. Room 5002
Washington D.C., 20554

Commissioner Michael Powell
Federal Communications Commission
1919 M Street N.W. Room 844
Washington, D.C. 20554

David Furth, Chief
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W. Room 70002
Washington D.C. 20554

Commissioner Gloria Tristani
Federal Communications Commission
1919 M Street N.W. Room 826
Washington, D.C. 20554


David Fichtenberg